

ARKANSAS COURT OF APPEALS

DIVISION I, III, and IV

No. CACR08-170

AMANDA GAIL HOLT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered December 31, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR-2007-086]

HONORABLE BARRY SIMS, JUDGE

CONCURRING OPINION

ROBERT J. GLADWIN, Judge

Although I believe that appellant's conviction for manufacturing a controlled substance is not supported by substantial evidence, I believe the other counts on which the appellant was convicted can be affirmed.

Appellant was charged with possession of drug paraphernalia with the intent to manufacture. It is unlawful for a person to use, or possess with the intent to use, drug paraphernalia to manufacture methamphetamine. Ark. Code Ann. § 5-64-403(b)(5)(A) (Supp. 2007). Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is constructively possessed. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). Constructive possession can be implied when the contraband is in the joint control of the accused and another. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874

(2002). Joint occupancy, however, is not sufficient in itself to establish possession or joint possession. *Id.* There must be some additional factor linking the accused to the contraband, and the State must show additional facts and circumstances indicating the accused had knowledge and control of the contraband. See *Walley v. State*, 353 Ark. 586, 112 S.W.3d, 349 (2003).

In *Walley*, the appellant was convicted of possession of drug paraphernalia with intent to manufacture. The jury was presented with evidence of an operational methamphetamine lab in the kitchen of Walley's residence. During a search of the residence, law enforcement agents found numerous items used in the manufacturing of methamphetamine. Walley argued that there was no additional evidence linking him to the contraband. Our supreme court held that the jury could reasonably conclude that Walley knew of the existence of the drugs and drug manufacturing paraphernalia in the kitchen of the residence. The jury did not have to believe Walley's testimony that he did not notice the smell in the house, did not notice the stains in the kitchen, did not notice the black plastic on the windows, and did not know what was in the locked cabinets. *Walley v. State*, *supra*.

In *Fitting v. State*, 91 Ark. App. 283, 229 S.W. 3d 586 (2006), the appellant was also convicted of possession of drug paraphernalia with intent to manufacture. The testimony showed that Fitting stayed periodically at the residence of Eddie McCann. McCann testified that Fitting and a woman were "cleaning up a cook" when the police arrived. A police officer testified that Fitting and a woman were walking toward the living room from the back area of the house, although he could not say specifically from which room they came. In the

house, police found a number of components for a methamphetamine lab. Fitting argued that the State provided no evidence that he was in actual or constructive possession of drug paraphernalia with the intent to manufacture. This court held that the evidence tended to connect Fitting with the offense charged. We stated that, among other factors, the police officer testified that Fitting and the woman were walking to the living room from the back area of the house, thus Fitting was in close proximity to the manufacturing items that were seized.

In our case, Officer Howard testified that the only sound he heard was movement coming from the bedroom where the methamphetamine lab was located. Further, appellant said she had been sleeping, and the only bed in the house was in the bedroom. There was a strong chemical odor coming from the residence. Ms. Holt had lived there for at least two weeks. Additionally, the dresser in the bedroom contained children's clothes and a syringe.

Jurors need not view each fact in isolation but rather may consider the evidence as a whole. *Kelley v. State*, 103 Ark. App. 110, ___ S.W. 3d ___ (2008). The jury is entitled to draw any reasonable inference from the circumstantial evidence to the same extent it can from direct evidence. *Id.* Jurors are instructed that they are allowed to draw upon common sense to infer intent from the circumstances. See *DeShayer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). I believe that this evidence connects the appellant with constructive possession of the working methamphetamine lab.

Appellant next argues that there is insufficient evidence that she kept or maintained a drug premises. She argues that her mere presence alone is insufficient to support the

verdict. It is unlawful for a person knowingly to keep or maintain any store, shop, warehouse, dwelling, building or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance, including methamphetamine. Ark. Code Ann. § 5-64-402(a)(2) (Repl. 2005). There is no doubt that appellant resided in a dwelling that was resorted to by persons to obtain methamphetamine. The only question was did appellant “keep or maintain” this dwelling. The terms “keep or maintain” are not defined in the statute, and our supreme court has not interpreted this statute. It is clear that something less than actual ownership is sufficient for a person to keep or maintain a drug premises. See *Bridges v. State*, 46 Ark. App. 198, 878 SW 2d 781 (1994); *Sweat v. State*, 25 Ark. App. 60, 752 SW 2d 49 (1988). Webster’s II dictionary defines “keep” as “to remain in a given state: stay.” “Maintain” is defined as “to keep an existing state.” It is clear that appellant lived in the dwelling and kept it in its existing state. This is sufficient to find that appellant kept or maintained a drug premises.

Finally, appellant argues that the State failed to introduce substantial evidence that she, with the intent to manufacture methamphetamine, permitted her children to be exposed to a chemical substance or methamphetamine. Any adult who with the intent to manufacture methamphetamine, knowingly causes or permits a child to be exposed to, ingest, inhale or have any contact with a chemical substance or methamphetamine is guilty of a Class C felony. Ark. Code Ann. § 5-27-230(b)(1)(Repl. 2006). Appellant argues that there is no evidence that she had any intent to manufacture methamphetamine. The statute provides that intent may be demonstrated by the substance’s use, quantity, manner of storage, or

proximity to another precursor or equipment used to manufacture methamphetamine. In this case an entire working methamphetamine lab was found in the bedroom where children's clothes were found. The various chemicals were found in close proximity to the lab, and other bags of chemicals were found in the other end of the residence. Again, the close proximity of the various pill soak and bi-layer liquids to the rest of the lab show a close proximity. Under the statute, there is enough to show an intent to manufacture.

It should be noted that I do not read Arkansas Code Annotated section 5-27-230(b)(1) to be an enhancement statute. I believe that this is a separate, stand-alone violation against the family with an enhancement clause if the child suffers physical injury.